IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 155 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE K.M.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

MEHSANA DISTRICT CO.OP.MILK PRODUCERS UNION LTD.

Appearance:

MR TANVISH U BHATT for Petitioner No. 1

MR MANISH J SHAH for MR JP SHAH for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE K.M.MEHTA

Date of decision: 02/04/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

1. The Income Tax Appellate Tribunal, Ahmedabad Bench `B', has referred the following question for the opinion of this Court pursuant to the directions issued under Section 256(2) of the Income Tax Act, 1961:-

> "Whether, on the facts and circumstances of the case, the Tribunal has not erred in law and facts in allowing the appeal of the assessee and quashing the order of the C.I.T. under Section 263 and restoring the order of the I.T.O.?."

2. The relevant assessment year was 1979-80. For the previous year ended 31st March, 1979, the assessee filed return of income on 31-7-1979 declaring " nil" income. The assessee was allowed deduction under Section 80HH in respect of the new Industrial Undertaking in the backward area. As regards the relief claimed under Section 80J of the Act in respect of its project no.2 i.e. the powder plant which was started from 1-11-1972, the Income-tax Officer allowed the amount of Rs.8,40,624/- to be carried forward as the profit of the new undertaking.

3. The decision of the Income-tax Officer was taken up in revision under Section 263 of the Act by the Commissioner, who by order dated 11th September, 1984, held that the assessment order was erroneous and prejudicial to the interest of the Revenue, and set aside the order as regards the relief granted under Section 80HH and 80J with a direction to the I.T.O. to make fresh assessment in accordance with law, after making necessary inquiries for determining the profits of the old and new units for the purpose of determining the quantum of deduction admissible under Section 80HH of the Act. The Income-tax Officer was further directed to compute the capital for the purpose of relief under Section 80J in accordance with law. The Commissioner found that the relief under Section 80J was not properly worked out, because the I.T.O. had included a sum of Rs.49,88,158/- on the Head Office account in computing the capital.

4. The Tribunal allowing the appeal of the assessee held that since the I.T.O. had made an order pursuant to the direction of the Inspecting Assistant Commissioner under Section 144B (4) of the Act, the Commissioner could not have exercised his revisional powers under Section 263 of the Act. The Tribunal upheld the preliminary objection of the assessee against the exercise of powers under Section 263 by the Commissioner on that ground. As

regards the relief under Section 80J, the Tribunal held that the order of the I.T.O was carried in appeal and had merged with the order of the C.I.T. (Appeals) dated 31st January, 1984, which was passed prior to the making of the order by the Commissioner on 11-9-1985 under Section 263 of the Act. The Tribunal noted that the question of computation of relief under Section 80J was the subject matter of the appeal before the C.I.T.(Appeals), who had dealt with that aspect in paragraph 8 of the appellate order. The Commissioner, therefore, could not have exercised his revisional powers in respect of the relief granted under Section 80J of the Act to the assessee. As regards the relief granted under Section 80HH of the Act, the Tribunal found that a consistent approach was adopted in respect of the earlier previous years by the assessee who divided the expenses on a rational basis of proportion of milk used in production of the two plants, new and old. It was held that when a consistent basis was adopted and it was a rational basis, the fact that any other order could also be passed would not mean that the order of the I.T.O. was erroneous and prejudicial to the interest of the Revenue. The Tribunal, therefore, set aside the order of the Commissioner made under Section 263 of the Act and restored the order of the Income-tax Officer.

5. It is obvious that when the decision of the Income-tax Officer on the aspect of deduction granted under Section 80J was already considered by the C.I.T.(Appeals), who had made an order earlier than the revisional order made by the Commissioner under Section 263, the order of the Income Tax Officer as regards such deduction under Section 80J had already merged in the appellate order. There was, therefore, no order of the Income-tax Officer which could have been revised by the Commissioner under Section 263 on the question of grant of benefit of Section 80J of the Act to the assessee. The Supreme Court in the case of COMMISSIONER OF INCOME TAX v. SHRI ARBUDA MILLS LTD., reported in 231 ITR 50, in the context of the provisions of Section 263(1) of the Act, referring to Expln. Clause (c) thereof, held that powers of the Commissioner under subsection (1) of Section 263 extended to such matters as had not been considered and decided in appeal. It, therefore, necessarily follows that the powers under Section 263 could not have been invoked when the order taken in revision was already subjected to appeal and the appellate order was made in respect thereof as was made in the instant case. The Division Bench of this Court in COMMISSIONER OF INCOME TAX v. SHASHI THEATRE PVT.LTD., reported in 248 I.T.R. 126, has in terms held that the

revisional powers under Section 263 did not extend to matters on which the appellate authority had bestowed consideration and given a decision. It is thus clear that the Commissioner could not have exercised his revisional powers under Section 263 against the order of the Income-tax Officer granting deduction under Section 80J of the Act, which order was appealed against and had merged in the order of the C.I.T.(Appeals), which was made on 31st January,1984, prior to making of the revisional order.

6. The Tribunal upheld the preliminary objection of the assessee that the revisional power under Section 263 could not have been exercised in cases where the order was made by the Income-tax Officer pursuant to the direction issued by the IAC under Section 144B(4) of the Act. This finding of the Tribunal is clearly contrary to the decision of the Supreme Court in T.N.CIVIL SUPPLIES CORPORATION LTD. v. COMMISSIONER OF INCOME-TAX, reported in 260 I.T.R. 82, in which the Supreme Court referring to the uniformity of interpretation given by several High Courts to the provisions of Section 263 read with Section 144B, upheld the decision of the High Court that the order made by the Income-tax Officer on the basis of directions given by the IAC under Section 144B was revisable by the Commissioner. The Supreme Court held that in its view, having regard to the subsequent amendments to the Act issued from time to time there was no scope for limiting the phrase "order passed by the Income-tax Officer" in Section 263 to exclude orders passed by the Income-tax Officer on the directions of a superior authority either under Section 144A or 144B of the Act. In our view, therefore, the Tribunal committed an error in upholding the preliminary objection of the assessee. The learned Counsel for the assessee very fairly submitted that the decision of the Tribunal upholding the preliminary objection of the assessee on this count cannot be sustained, being contrary to the decision of the Supreme Court, in T.N.CIVIL SUPPLIES CORPORATION LTD.(supra), and also against the decision of this Court rendered in COMMISSIONER OF INCOME TAX v. SHREYAS LAND DEVELOPMENT CORPORATION (ITR NO.120 of 1986 decided on 9-7-2001), which has followed the decision of the Andhra Pradesh High Court in the case of COMMISSIONER OF INCOME TAX v. EAST COAST MARINE PRODUCTS (P.)LTD. AND ANOTHER, reported in 181 I.T.R. 314.

7. The only question that now remains to be considered is whether the Tribunal was justified in setting aside the order of the Commissioner in respect of deduction granted under Section 80HH of the Act? The Tribunal has found as a matter of fact that the assessee

has adopted consistent approach in the earlier years for apportioning the expenditure between the two units, old and new, which was accepted by the department. In paragraph 9 of its order, the Tribunal has, in terms, observed that the method followed by the assessee of dividing the overhead expenses on a proportionate basis in the proportion of 5.5: 4.5 was adopted for the assessment years 1978-79 as well as 1980-81. It was held that when such consistent basis was adopted there was no reason to interfere in the matter when it was not shown to be irrational. It is well settled that the provisions of Section 263(1) cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer, and it is only when the order is erroneous that the Section will be attracted. The Supreme Court in MALABAR INDUSTRIAL CO.LTD. v. COMMISSIONER OF INCOME TAX, reported in 243 ITR 83 has observed that the phrase " prejudicial to the interests of the Revenue has to be read in conjunction with an erroneous order passed by the Assessing Officer". It was held that when two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue unless the view taken by the Income-tax Officer is unsustainable in law. It is not shown how the method followed by the assessee to divide the expenses for the purpose of claiming relief under Section 80HH was improper or unacceptable. The Income-tax Officer as well as the Tribunal has found that the expenses were apportioned on a rational basis and it would not be open for this Court to go beyond that finding which appears to have been reached on the basis of the material on record which showed that in the earlier years same proportion for dividing the expenses was consistently followed. The Department has not been able to show that for those earlier two years any objection was raised against such apportionment.

8. For the foregoing reasons, while holding that the Tribunal had committed an error in upholding the preliminary objection of the assessee against the revisional exercise of powers under Section 263 of the Act in the context of the order made by the Income-tax Officer pursuant to the direction issued by the IAC under Section 144B(4) of the Act, we hold that the Tribunal has not committed any error in allowing the appeal of the assessee and quashing the order of the C.I.T. passed under Section 263 of the Act and in restoring the order of the Income-tax Officer. The question referred to us is, therefore, answered in favour of the assessee and against the Revenue. The Reference stands disposed of

accordingly with no orders as to costs.

(R.K.Abichandani,J.)

(K.M.Mehta,J.)

stanley-rka.